INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Pac Rim Cayman LLC	)	
	)	
Claimant,	)	
	)	
v.	)	**ICSID Case No. ARB/09/12**
	)	
The Republic of El Salvador	)	
	)	
Respondent.	)	

THE REPUBLIC OF EL SALVADOR'S POST-HEARING BRIEF OBJECTIONS TO JURISDICTION

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I. INTRODUCTION

1. El Salvador has presented four independent sets of objections to jurisdiction that should result in the dismissal of this entire arbitration: 1) abuse of process; 2) denial of benefits; 3) objections *ratione temporis*; and 4) objections to jurisdiction under the Investment Law of El Salvador. In its pleadings, El Salvador demonstrated the validity of all of its objections. The presentations and testimony at the oral proceedings revealed that Claimant's defenses as set forth in its Counter-Memorial and Rejoinder were based on false assertions of fact and misleading arguments. The totality of the evidence has thus demonstrated that there is no jurisdiction under the ICSID convention with respect to CAFTA or the Investment Law of El Salvador.

II. THE ENTIRE ARBITRATION MUST BE DISMISSED BECAUSE OF CLAIMANT'S ABUSE OF PROCESS

2. Pacific Rim Mining Corp., a Canadian corporation, through its wholly-owned shell subsidiary, Pac Rim Cayman, has abused the international arbitration process by changing Pac Rim Cayman's nationality from the Cayman Islands to the United States, and then using this nationality to initiate ICSID arbitration proceedings for a pre-existing dispute and assert claims under CAFTA and the Investment Law of El Salvador as a national of the United States. The consequence of this abuse can only be the dismissal of this entire arbitration.

3. The doctrine of abuse of process has been developed to prevent would-be claimants from improperly accessing international arbitration by manipulating the corporate form to create jurisdiction that would not and should not otherwise exist. At the hearing, El Salvador discussed a straightforward, two-prong test for abuse of process in cases involving manipulation of the corporate form to change the nationality of a would-be claimant:

i. *Was the corporate form manipulated in a way that allowed Claimant to access jurisdiction where it otherwise would not have been able to do so?,* and

ii. *Did the change of nationality take place after the alleged interference with the investment or after the dispute began or became foreseeable?*

4. In its written pleadings, Claimant admitted that Pacific Rim Mining Corp., a Canadian company, manipulated the corporate form of its shell holding company Pac Rim Cayman to gain access to international arbitration. El Salvador's written pleadings and the undisputed evidence in the record similarly demonstrated that the alleged interference with Claimant's investment took place prior to December 13, 2007, when Pacific Rim Mining Corp. changed the nationality of Pac Rim Cayman and transferred another subsidiary to Pac Rim Cayman. The presentations and testimony at the hearings removed any possible doubt that both prongs of the abuse of process test have been met, and further demonstrated that the version of the facts averred by Claimant in its written pleadings to avoid a finding of abuse of process was a distortion of reality.

5. Claimant's defense to El Salvador's abuse of process objection rested on two faulty factual pillars: 1) its assertion that a *de facto* ban on mining was created or announced on March 11, 2008; and 2) its assertion that the primary reason Pacific Rim Mining Corp. changed Claimant's nationality was to save money and not to prepare for arbitration of an existing dispute with El Salvador. The first was created to support Claimant's position that the dispute either began or "crystallized" after the date of the change of nationality, and the second to support Claimant's assertion that Pacific Rim Mining Corp. did not know that there was a pre-existing dispute when it changed Pac Rim Cayman's nationality to make it eligible to initiate this arbitration. As discussed below, both statements were confirmed to be false during the hearing and, as a result, Claimant's entire defense to the abuse of process objection has fallen.

A. Claimant's defense against abuse of process has been disproven on the facts

1. Claimant's effort to artificially move the date of the interference with its investment by alleging that a ban on mining was created or announced on March 11, 2008, has failed

6. El Salvador demonstrated in its written and oral pleadings that no *de facto* ban on mining was created or announced in March 2008 and that the measures Claimant alleged were

taken by El Salvador that affected the investment all occurred prior to the December 13, 2007 change of Claimant's nationality. El Salvador demonstrated that the dispute was not only "born," but that it had also "crystallized" before that date. The proof presented by El Salvador is conclusive and for economy of space it will not be repeated here.[1]

a. Claimant has constantly changed its position on the date of the dispute

7. In contrast to the consistent position articulated by El Salvador, Claimant's representations regarding the dispute have been a moving target, changing at each stage of these proceedings. Originally, in its Notice of Arbitration, Claimant alleged facts that made very clear that the dispute was born, developed, and "crystallized" between 2004 and 2007. El Salvador again asks the Tribunal to look carefully at the factual allegations in the Notice of Arbitration, particularly the Notice of Intent, which was incorporated by reference into the Notice of Arbitration, and to recall that Claimant initiated this arbitration stating:

> [a]s previously set out in the Notice of Intent and further summarized herein, PRC's claims arise out of unlawful and politically motivated **measures** taken by the Government of President Elías Antonio Saca González, through the *Ministerio de Medio Ambiente y Recursos Naturales* ("MARN") and MINEC, against Claimant's investments.[2]

8. Those **measures** "previously set out in the Notice of Intent" in significant detail took place between 2004 and 2007 and include:

> the arbitrary imposition of unreasonable delays and unprecedented regulatory obstacles designed and implemented with the aim of preventing PRES and DOREX from developing gold mining rights in which [Claimant], through those Enterprises, has made substantial and long-term investments.[3]

[1] *See* Memorial, Section II.B; Reply, Section III.C; Transcript of Hearing, Day 1, at 21:22 – 51:10.
[2] NOA, para. 7 (emphasis added).
[3] NOI, Introduction.

9. Claimant alleged: "[a]s a result of the measures, the rights held by the Enterprises have been rendered virtually valueless and PRC's investments in El Salvador have been effectively destroyed."[4] In section C.4 of the Notice of Intent entitled "El Salvador's Arbitrary and Unlawful Measures," Claimant listed only measures that took place between 2004 and 2006 related to El Dorado, nothing later. We refer the Tribunal to paragraphs 18, 22, 23, and 24 of the Notice of Intent.

10. Significantly, Claimant did not mention the press reports of statements by President Saca in March of 2008 in the Notice of Intent as announcing a new mining ban policy, or as being a departure from prior communications, but rather referred to them in a list of actions described under heading C.4.c, "Confirmation of the Government's Opposition to PRC's Investment Activities." According to the Notice of Intent, the Government's opposition to the investment was "confirmed" at "the end of 2006," in 2007, and in 2008.[5]

11. When it filed its written pleadings—after it became aware of El Salvador's objections in this case—Claimant changed its position on the timing of the dispute, but it did not renounce its original allegations of fact that clearly contradict its new position. Claimant attempted to artificially move the date of the dispute to a date after the change of nationality. It did this by acting as if the specific measures alleged in its Notice of Arbitration had never taken place and instead alleging that on March 11, 2008, President Saca announced a nationwide ban on metallic mining. According to Claimant's new theory, the dispute, therefore, either arose or "crystallized" on that date. Claimant formulated its position as follows:

> The act supporting Pac Rim Cayman's claims of breach resulting in loss or damage is Respondent's *de facto* ban on mining as announced by President Saca in March 2008 . . . . As relevant to Respondent's abuse of process argument, since the act giving rise to the dispute did not occur until March 2008 or, alternatively, only became recognizable as a continuing or composite act in breach of

[4] NOI, Introduction (emphasis added).
[5] NOI, paras. 29-32. Under Claimant's convenient, post-arbitration theory, a dispute is not "born" or "crystallized" until the latest point in time when a government official "confirms" a prior position. The adoption of this view, of course, would eviscerate the abuse of process doctrine.

> CAFTA obligations at that time, Pac Rim Cayman's domestication to Nevada in December 2007 could not have been "a *retrospective* gaming of the system to gain jurisdiction for an *existing dispute*."[6]

12. Claimant's defense to El Salvador's abuse of process objection rested entirely on this attempt to rewrite the undisputed facts. It has been demonstrated, however, that Claimant has no real evidence to support this assertion. Its claim was based solely on a strained interpretation of a brief impromptu statement made by President Saca during a visit to the Salvadoran department of Cabañas for the inauguration of the construction of a new university campus. Pacific Rim Mining Corp. became aware of this statement because it was reported briefly by one or two news services in El Salvador. It was not reported in any significant international publication or specialized mining press. Despite Claimant's repeated assertions (with no supporting evidence) that the statements were "widely interpreted as imposing a *de facto* ban on metallic mining throughout El Salvador,"[7] the reports seem to have gone completely unnoticed by anyone but Pacific Rim Mining Corp.

13. Claimant has carefully avoided quoting the majority of the substantive language of these March 2008 press reports because it wants to read into them words they did not contain and assign them a political and legal significance they simply did not have.[8] Claimant asserted that the dispute suddenly sprang into existence or "crystallized" on that date because President Saca had suddenly announced a nationwide ban on mining. It is now clear that this version of events simply does not concord with reality.

b. Claimant admitted at the hearing that no ban on mining was created or announced on March 11, 2008

14. In the face of the evidence presented by El Salvador, Claimant's position on the date of the dispute went through yet another metamorphosis. At the hearing Claimant

[6] Counter-Memorial, para. 376 (emphasis added). *See also* Counter-Memorial, para. 402; Shrake Witness Statement, para. 116; Rejoinder, para. 111.
[7] Shrake Witness Statement, para. 116.
[8] *See* Transcript of Hearing, Day 3, at 758:7-16 (noting that Claimant never presented the text of the press report which it claims announced the alleged *de facto* ban on mining).

contradicted, and apparently abandoned, the factual assertion upon which it had based its entire defense to the abuse of process objection.

15. First, and most importantly, the President and CEO of Pacific Rim Mining Corp. of Canada specifically refuted the characterization repeated again and again in Claimant's written pleadings that the company believed that the statements of President Saca reported in the press in March of 2008 created or made Claimant aware of a nationwide ban on mining. When asked "it's your position that on March 12, 2008, you knew there was a ban?" Mr. Shrake stated "No."[9] Surprised at Mr. Shrake's truthful answer contradicting his counsel's entire theory of the case, Mr. Smith repeated the question, and Mr. Shrake confirmed his answer: "No."[10]

16. Then Mr. Shrake reaffirmed Claimant's position as originally expressed in the Notice of Intent and proven by El Salvador through other evidence: the reported statements by President Saca did not create or reveal a ban on mining, but were only additional confirmation of the situation that had existed between the parties for more than a year. Mr. Shrake's testimony continued with the following question from Mr. Smith:

> Q. Okay. But on that date--but immediately thereafter you threatened arbitration in a letter of April 14, 2008; is that correct?
>
> A. That's correct.
>
> Q. Okay.
>
> A. I did not know that every mining Concession in El Salvador was eventually going to be expropriated. I didn't know that at that point in time, but what I did know is that our efforts to get the Government to follow the law with our particular asset had not been followed, and the indications were with numerous consultations was that they were just going to continue to dangle and withdraw the carrot.[11]

17. Mr. Shrake's testimony clearly reveals that in April of 2008 when he, as CEO of Pacific Rim Mining Corp., threatened ICSID arbitration under CAFTA regarding the dispute in

[9] Transcript of Hearing, Day 2, at 481:11-13.
[10] Transcript of Hearing, Day 2, at 481:14-16.
[11] Transcript of Hearing, Day 2, at 481:17 – 482:7 (emphasis added). There were no other metallic mining concessions active in El Salvador at that time or now. Commerce Group's environmental permits were revoked in 2006.

this case, it was not based on any belief that President Saca had created or announced a ban on mining. Rather he threatened arbitration because he believed his company's "efforts to get the Government to follow" the company's interpretation of the law had failed. His testimony also reveals that he had reached his conclusion that an arbitrable dispute existed based on "numerous consultations," and not on the press reports, as alleged by Claimant in its written pleadings.

18. Significantly, the record reveals that all of Pacific Rim Mining Corp.'s efforts to get the Government to follow the company's interpretation of the law took place between December of 2004 and January of 2007.[12] After that date, Pacific Rim Mining Corp. was focused on getting the Government to pass a new law to overcome the defects in its concession application under the existing Mining Law.[13] Similarly, nearly all of the "numerous consultations" referred to by Mr. Shrake must have taken place in 2004-2006, long before the change of nationality. Claimant has alleged no "consultations" or meetings with members of the Salvadoran executive branch or officials in Ministries responsible for adjudicating mining permits at any time between January 2007 and December 4, 2007, when the Board of Pacific Rim Mining Corp. resolved to change Pac Rim Cayman's nationality.[14]

19. Mr. Shrake's admission confirms the facts set forth in the Notice of Intent and otherwise proven by El Salvador: 1) the dispute existed long before March 2008; and 2) the March 2008 press reports of statements by President Saca were just one more in a series of statements and communications by the Government regarding its concerns about granting exploitation rights without understanding the environmental impacts. The March 2008 reports did not begin or "crystallize" the dispute, or significantly change the parties' relationship.

[12] Shrake Witness Statement, para. 86 ("PRES's legal counsel in El Salvador requested an 'authentic interpretation' of the law and also suggested a legislative amendment to clarify and resolve the issue. Between 2004 and 2006, we tried both approaches, but neither moved forward.").
[13] *See* Proposed New Mining Law, Nov. 2007 (R-36); Shrake Witness Statement, para. 86 ("It seemed to us that . . . the legislative approach might be successful (and certainly preferable to reducing the concession size or trying to buy up all the land overlaying the proposed concession size) . . . .").
[14] Transcript of Hearing, Day 3, at 599:16 – 600:7.

20. Claimant's counsel made no effort on re-direct to have Mr. Shrake change or qualify his statement. Rather, faced with the facts alleged in their own Notice of Arbitration and proven by El Salvador, and particularly with the confirmation of El Salvador's position by their client, each of Claimant's counsel speaking at the hearing presented a new and different view of the genesis of the dispute and the import of the March 2008 press reports. Perhaps most revealing were: 1) Mr. de Gramont's statement that "we didn't--no one testified that suddenly in March 2008 we knew that there was a ban in place";[15] and 2) Mr. Ali's statement that his "client's investment was rendered valueless, virtually destroyed" only "after the meetings in June of 2008."[16] Both of these statements directly contradict the repeated assertions in their written pleadings, cited above, stating precisely that the March 2008 statements by President Saca "suddenly" made them aware of the alleged mining ban and that it was the announcement of the ban that destroyed their investment. They even argued that the alleged announcement of the ban caused an immediate and precipitous drop in Pacific Rim Mining Corp.'s stock price.[17] As El Salvador showed at the hearing, this assertion is utterly false.[18] Claimant's counsel's reversal on this key factual issue is a clear recognition of the truth of Mr. Shrake's admission.

21. It is, therefore, now absolutely clear that Claimant's assertion that the dispute arose, "crystallized," or somehow suddenly became cognizable on March 11, 2008, because of the announcement of a *de facto* mining ban by President Saca, was a *post hoc* attempt to distort the facts to fit a temporal sequence necessary to avoid having this arbitration dismissed because of Pacific Rim Mining Corp.'s abuse of process.

22. The recognition that the version of the facts suggested by the Counter-Memorial and Rejoinder was wrong has definitive consequences for the abuse of process objection. As indicated, the determination of abuse of process hinges on the factual question of whether the

[15] Transcript of Hearing, Day 3, at 682:22 – 683:2.
[16] Transcript of Hearing, Day 3, at 750:3-7 (emphasis added).
[17] Counter-Memorial, para. 413.
[18] Transcript of Hearing, Day 1, at 116:9-18 (highlighting that the drop in the parent company's stock price did not occur in March, but in July, when the Canadian company announced its threat of arbitration).

measures alleged to interfere with the investment occurred before or after the change of nationality on December 13, 2007. Claimant's defense relied on its assertion that a single measure occurring after that date, the alleged announcement of a ban on mining in March of 2008, caused it harm. This effort to rewrite the history of the dispute to place its origin after December 13, 2007 has failed.

23. This is fatal to Claimant's defense. First, it means that Claimant no longer has a basis to deny the allegations set forth in its Notice of Arbitration and otherwise proven by El Salvador that the alleged interference with the investment and the full development of the dispute took place prior to the change of nationality in December of 2007. Second, because Claimant and its parent have specifically recognized that a fully crystallized arbitrable dispute existed in March and April of 2008,[19] the dispute must have been based on something that occurred prior to April 2008, something other than the statements by President Saca that Mr. Shrake now admits did not alert him to any alleged ban on mining.

24. Both parties recognize that the measures affecting the investment had occurred and the dispute existed as of April 2008. Therefore, the evidence presented by Claimant regarding events after April 2008 is irrelevant to the abuse of process inquiry because such events cannot have any effect on the date of the dispute. Even if it were true, as Mr. de Gramont repeated at the hearing, that statements by government officials in June of 2008 and later revealed a ban on mining, this is irrelevant, because Claimant has admitted that no ban was announced before April 2008 but an arbitrable dispute existed in April of 2008. Of course, as has been shown, the dispute was in fact based on measures Claimant alleges occurred between 2004 and 2007. Thus, Mr. de Gramont and Mr. Ali's apparent attempt at the end of the oral

[19] Counter-Memorial, para. 376 ("The act supporting Pac Rim Cayman's claims of breach resulting in loss or damage is Respondent's *de facto* ban on mining as announced by President Saca in March 2008. To the extent that ban may have pre-dated the March 2008 announcement and been manifested by the earlier failures to act, those failures only became recognizable as applications of a discrete measure in breach of CAFTA obligations with the announcement."); Transcript of Hearing, Day 2, at 481:11-20.

proceedings to move the date of the dispute even farther into the future (to June 2008 and later) fails because they have already admitted that the dispute existed in March and April of 2008.

25. In addition, and most importantly, if the March 2008 press reports on President Saca did not announce a mining ban and were merely a restatement of previously expressed government positions regarding mining permits and the environment, then there was no legally relevant change in the dispute or in the parties' relationship between December 13, 2007 and April 14, 2008, when Mr. Shrake sent the letter to President Saca threatening arbitration. Therefore, if a fully crystallized arbitrable dispute existed on April 14, 2008, which Claimant has expressly admitted and cannot deny, then, because nothing changed, the dispute must also have existed on December 13, 2007, the date of the change of nationality.

2. Claimant's denial that its nationality was changed primarily or solely to gain jurisdiction with regard to a pre-existing dispute has been disproven

26. Claimant alleged in its written pleadings that the primary reason for changing the nationality of Pac Rim Cayman to the United States was to save a very small amount of money on fees for registration in the Cayman Islands and that gaining jurisdiction under CAFTA was a secondary consideration. Claimant repeated again and again the description of a sequence of events in making the decision whereby when it deregistered other offshore subsidiaries—particularly Pacific Rim Caribe—it realized that it could also save money by moving Pac Rim Caribe to the United States.[20] It is clear that the intent of these statements was to lead the Tribunal to believe that saving money on fees for Pac Rim Cayman in the Cayman Islands was "the primary factor behind its domestication to Nevada."[21]

27. This version of events was central to Claimant's defense against abuse of process. From the beginning, however, it seemed implausible, and at the hearing the President and CEO of Pacific Rim Mining Corp. finally admitted that it was not true. When asked "Is it your

[20] Counter-Memorial, paras. 393-394; Shrake Witness Statement, paras. 110-111.
[21] McLeod-Seltzer Witness Statement, para. 36.

position, your truthful position, that the primary reason for changing the nationality of Pac Rim Cayman was to save these few thousand dollars in fees?" Mr. Shrake answered "No."[22]

28. He also made other specific admissions that demonstrate that Pacific Rim Mining Corp.'s decision to change Claimant's nationality was for purposes of initiating this proceeding, not for saving money. While Mr. Shrake and Claimant in its written pleadings repeatedly asserted that the change of nationality was done "without losing any tax benefits," Mr. Shrake admitted during his testimony at the hearing that because of the change of nationality, Pacific Rim Mining Corp. in fact lost the major tax-haven benefit of avoiding taxation on the profits earned from an eventual sale of their Salvadoran assets. While Mr. Shrake claimed on cross-examination that at the time of the change of nationality they did not intend to sell their Salvadoran assets, he admitted upon questioning from Professor Stern that in fact they maintained the holding company structure in Nevada because they "wanted to still have the flexibility of slicing off [*i.e.*, selling] the asset at the Nevada holding company level."[23] If they ever use that flexibility, they will pay very substantial taxes in the United States that they never would have had to pay if they had kept Pac Rim Cayman offshore. It is therefore clear that the repeated assertion indicating the change of nationality could be done "without losing any tax benefits" was not true. Pacific Rim Mining Corp. lost the main tax benefit it had gained by establishing Pac Rim Cayman when it moved this tax-shelter subsidiary to Nevada, and would not have done so just to save nominal fees.

29. Similarly, Pacific Rim Mining Corp. did not even take the money-saving actions that they repeatedly asserted were the source of their decision to save additional money by changing Pac Rim Cayman's nationality. Even while claiming that deregistering the Cayman Islands subsidiary, Pacific Rim Caribe, provided the "impetus" for the "reorganization" involving Pac Rim Cayman,[24] Claimant had to admit that Pacific Rim Mining Corp. did not in fact

[22] Transcript of Hearing, Day 2, at 454:12-16.
[23] Transcript of Hearing, Day 2, at 518:20-22.
[24] Counter-Memorial, para. 393.

deregister Pacific Rim Caribe.[25] In fact, Mr. Shrake indicated at the hearing that he did not even know if Pacific Rim Mining Corp. ever deregistered Pacific Rim Caribe and it may continue to this day to pay the fees associated with that registration.[26] This admission is wholly inconsistent with the alleged decision-making process based on this deregistration relied on by Claimant.[27]

30. Clearly, the decision-making process described in Claimant's written pleadings, including the first three witness statements, was fabricated to avoid admitting that the true motivation for changing Pac Rim Cayman's nationality was to gain access to international arbitration with regard to an existing dispute with El Salvador.

31. The change of nationality could have in fact only been the result of the advice of international arbitration counsel. At the hearing, when counsel for El Salvador asked Mr. Shrake how he knew that changing Pac Rim Cayman's nationality would enable the company to acquire CAFTA protections, Claimant's counsel, Mr. de Gramont, warned Mr. Shrake "not to reveal the substance of attorney-client communications."[28] Indeed, after months of resisting answering El Salvador's questions about when the attorney-client relationship had started, Claimant was forced to admit in a letter dated April 22, 2011, only ten days before the hearing, that the attorney-client relationship between the Pacific Rim group of companies and its arbitration counsel commenced "on or around" October 24, 2007.[29] This date is over a month before the Board of the Canadian parent voted to change Claimant's nationality (December 4, 2007).

32. It now is clear that the primary and most likely the sole purpose of the "restructuring" was to gain jurisdiction over an existing dispute.

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[25] Counter-Memorial, para. 142, n.170.
[26] Transcript of Hearing, Day 2, at 450:3 – 451:4.
[27] It is important to note that it was Mr. Shrake, the President and CEO of Pacific Rim Mining Corp., that made the decision to change the nationality of Pac Rim Cayman (Transcript of Hearing, Day 2, at 513:19-22) and not Ms. April Hashimoto, who is only alleged to have provided the idea of deactivating Pacific Rim Mining Corp.'s Mexican and Peruvian subsidiaries. Neither Claimant nor Mr. Shrake ever alleged that Ms. Hashimoto was the one who originated the idea to change Pac Rim Cayman's nationality.
[28] Transcript of Hearing, Day 2, at 462:14-19.
[29] Letter from Claimant's counsel to El Salvador's counsel, Apr. 22, 2011, at 1 (forwarded to the Tribunal by El Salvador on April 27, 2011).

3. Claimant's assertion that Pacific Rim Mining Corp. was unaware of the dispute in December 2007 because it received "constant assurances" that the concession application would be granted is contradicted by the facts

33. Although Claimant and its witnesses repeatedly stated that they received "constant assurances" that the applications would be approved, the few examples they actually provided came in self-serving statements from executives at Pacific Rim Mining Corp., with no corroborating evidence. More importantly, as pointed out by El Salvador at the hearing, Claimant's written pleadings did not allege a single meeting between Pacific Rim representatives and Government officials between January of 2007 and early December of 2007.[30]

34. In fact, no official could have given such assurance after January 2007 because by that time the El Dorado concession application was effectively denied by operation of law when PRES failed to remedy omissions notified by the Bureau of Mines, including the presentation of documentation showing authorization or ownership of the land in the requested concession area, a requirement Pacific Rim consciously decided not to meet because it did not have such ownership or authorization. As Mr. Shrake admitted during his testimony, he never received any assurances that the concession application would be approved if it did not comply with the existing law.[31] At the hearing Claimant made reference to a trip Mr. Shrake took "in November of 2007 with key members of the legislature so that they could look at a mine that was similar in design to El Dorado."[32] Members of the legislature, of course, could not give any assurances regarding approval of a mining concession by the executive branch of the government, and certainly could not give any assurances that an application that did not meet key legal requirements would be granted after it had already been effectively denied by operation of law. Rather than supporting Claimant's assertion of constant assurances that its concession application would be approved, the nature of this meeting is consistent with other evidence in the record showing that because its concession application failed to meet the requirements of the Mining

[30] Transcript of Hearing, Day 3, at 598:21 – 600:15.
[31] Transcript of Hearing, Day 2, at 473:5-8.
[32] Transcript of Hearing, Day 3, at 676:6-10.

Law of El Salvador, by 2007 Pacific Rim had given up on getting its concession application approved under the existing law and was seeking new legislation to change the legal requirements. Finally, Claimant's allegations in the Notice of Intent regarding its communications with the relevant Ministries in 2007 and undisputed evidence in the record completely contradict any assertion that might be made that assurances were given to Pacific Rim Mining Corp. between January and December of 2007.

35. Accordingly, Claimant's argument that it did not know it had a dispute in December of 2007 because it had received "constant assurances" that its application would be approved is completely unsupported by the facts in the record.

4. The term "measures" in the Notice of Intent and Notice of Arbitration referred to measures under CAFTA

36. As indicated above, Claimant originally alleged that its CAFTA "claims arise out of unlawful and politically motivated measures taken by the Government of El Salvador" between 2004 and 2007.[33] In its Notice of Arbitration, Claimant repeatedly referred to these "measures" as the basis of its claims and stated that as a result of these measures, "the rights held by the Enterprises have been rendered virtually valueless and PRC's investments in El Salvador have been effectively destroyed."[34] Understanding the consequences of these factual allegations for their abuse of process defense, Mr. Posner tried to explain them away at the hearing.[35]

37. Mr. Posner's statement is reminiscent of former U.S. President Clinton's famous line to the grand jury "[i]t depends on what the meaning of the word 'is' is." Mr. Posner would have the Tribunal believe that Claimant's counsel's team of highly experienced international arbitration experts did not actually mean "measures" under CAFTA when they used the term "measures" in filing the Notice of Intent and Notice of Arbitration to initiate a CAFTA arbitration. This is despite the fact that they stated clearly that their client's "claims" under

[33] NOI, Introduction (emphasis added). *See also* NOA, para. 7.
[34] NOI, Introduction; NOA, para. 9.
[35] Transcript of Hearing, Day 3, at 709:1-20.

CAFTA, "arise out of . . . measures taken by the Government of El Salvador" and then used the term "measures" again and again to describe their CAFTA claims. Mr. Posner's assertion is implausible considering that "measure" is a defined term in CAFTA and that no claim may be brought under CAFTA unless it relates to "measures adopted or maintained by a Party" affecting the investment.[36] In fact, if "measures" in the Notice of Arbitration and Notice of Intent did not mean "measures" under CAFTA, Claimant asserted no measures under CAFTA whatsoever when it initiated this arbitration. This simply is not believable.

38. Moreover, Mr. Posner's position, which is a reformulation of Claimant's position in the Counter-Memorial, is devastating for Claimant's case on the merits. He asserts that the alleged *de facto* mining ban was the only "measure that forms the basis for a dispute as that term is used in CAFTA."[37] As a matter of law, this position means that Claimant is in reality asserting that it has no valid claims under CAFTA. As the tribunal in the *Commerce Group* case stated based on allegations of the same *de facto* ban on mining,

> even if the *de facto* mining ban policy and the revocation of the permits could be teased apart, . . . the policy does not constitute a "measure" within the meaning of CAFTA. At most . . . the ban is a policy of the Government as opposed to a "measure" taken by it.[38]

[36] CAFTA Article 10.1.1(b) (emphasis added). Measure is a defined term of central significance to the operation of CAFTA's dispute resolution provisions. CAFTA Article 2.1: Definitions of General Application stipulates that "**measure** includes any law, regulation, procedure, requirement, or practice…" (emphasis in the original). The opening provision in the Investment Chapter of CAFTA, Article 10.1.1, Scope and Coverage, states that "[t]his Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments; and (c) with respect to Articles 10.9 and 10.11, all investments in the territory of the Party . . . ." (emphasis added). Chapter 10 of course, includes the dispute resolution provisions of CAFTA. The tribunal in *Methanex v. United States* described Article 1101 of NAFTA, which contains language identical to Article 10.1.1 of CAFTA as the "gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met." *Methanex Corporation v. United States of America*, Partial Award, Aug. 7, 2002, para. 106 (RL-12).

[37] Transcript of Hearing, Day 3, at 709:10-20.

[38] *Commerce Group Corp and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, para. 112 (RL-113).

39. Thus, if the Tribunal accepts Mr. Posner's explanation, there is no basis for jurisdiction, and this arbitration must be dismissed because the only "measure" alleged by Claimant is not actually a measure under CAFTA and Claimant has asserted no CAFTA claim.

5. Mr. Parada's testimony further confirmed that Pacific Rim knew it had a dispute with El Salvador before changing Pac Rim Cayman's nationality

40. Mr. Parada provided a witness statement stating that Claimant's counsel told him about the dispute with El Salvador that is now the subject of this arbitration in late November and early December 2007, immediately before Pac Rim Cayman was registered in the United States. Claimant's counsel had ample opportunity to present their own written or oral statements, or to deny the substance of Mr. Parada's statement in the letter exchange that took place after Mr. Parada submitted his written statement, but they did not deny the truth of Mr. Parada's testimony.

41. Instead, Claimant's counsel tried to raise doubts indirectly about the veracity of Mr. Parada's account. These attempts were unsuccessful. There are multiple examples of their failed attempts. Among others, the cross-examination failed to raise any doubt about the fact that the emails from Mr. Parada to various parties contained information about the existence of the dispute that could only have come from Claimant's counsel.[39] In addition, Mr. Posner raised the point that it was "not until July of 2008, when the possibility of arbitration between Pac Rim and El Salvador was being widely reported, that Pac Rim is named in Mr. Parada's correspondence," and that only then did he complete his "preliminary research" about the potential claimant.[40] The press reports, however, only mentioned Pacific Rim Mining Corp., the Canadian parent. The public information about the dispute in July 2008 still did not indicate that Pac Rim Cayman, the newly-registered U.S. subsidiary, was the potential claimant.

42. In addition, Mr. Posner focused on Mr. Parada's e-mail in which he mentioned "a possible international dispute in the making."[41] As El Salvador has explained, even if this

[39] Transcript of Hearing, Day 2, at 295:6-19; Annexes D, F, G, I, and R to Parada Witness Statement.
[40] Transcript of Hearing, Day 3, at 661:21 – 662:2; 663:12-21.
[41] Transcript of Hearing, Day 3, at 664:16-20.

qualified statement were taken as the extent of Pacific Rim's knowledge of a dispute in late 2007, it would be more than sufficient for purposes of establishing abuse of process. If Pacific Rim was concerned about the measures affecting its investment and planning for arbitration against El Salvador, and then decided to move Pac Rim Cayman to the United States and initiate CAFTA arbitration, that is abuse of process.

43. Finally, rather than deny that such statements were made, Mr. Posner tried to convince the Tribunal that it is "patently preposterous" that "two seasoned attorneys . . . in the course of a screening interview for a lateral associate position" would reveal "confidential information regarding a client's intention to initiate arbitration."[42] However, at the time Claimant's attorneys made the statements to Mr. Parada, there was nothing particularly noteworthy about them. All they said is that their client had a dispute with El Salvador and that they were preparing to file arbitration with respect to that dispute if their client did not get a mining concession. In fact, this information may not have even been confidential. Their client may have wanted the information to be known to increase pressure on El Salvador to grant a concession.[43] The information only became important much later when Claimant decided to try to conceal from the Tribunal that it was preparing to arbitrate an existing dispute in November of 2007 in order to avoid a finding of abuse of process. Thus it is in no way unbelievable that Mr. de Gramont and Mr. Ali told Mr. Parada about the dispute and the possible arbitration.

B. The legal standard for Abuse of Process is different from the legal standard for objections to jurisdiction ratione temporis

44. It is clear from the above discussion that, regardless of the legal standard applied, the facts proven by El Salvador and alleged or finally admitted by Claimant show beyond any doubt that the dispute was "foreseeable,"[44] "born,"[45] and also fully "crystallized"[46] before

[42] Transcript of Hearing, Day 3, at 655:20 – 656:10.
[43] In fact, Pacific Rim Mining Corp. hired the lobbying arm of Crowell & Moring at the same time it hired its international arbitration group, to lobby the United States government regarding its investment in El Salvador (R-118).
[44] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005, para. 329 (RL-60).

December 13, 2007. This makes the disagreement between the parties regarding the legal standard for abuse of process academic, as Claimant's initiation of this arbitration was abusive under any reasonable standard. Nevertheless, El Salvador believes that the legal questions raised in this case are of fundamental importance for the international arbitration system and, if addressed by the Tribunal, should be decided correctly.

45. Claimant has been inconsistent in its treatment of the standard for abuse of process. In its written pleadings, it appeared to be advocating that the Tribunal depart from the criteria set forth in prior ICSID cases dealing with abuse of process. Citing cases that did not deal with abuse of process, Claimant appears to take the position that a change in nationality to gain jurisdiction is only improper after the dispute has "crystallized." At the hearing, faced with El Salvador's overwhelming evidence that the dispute in fact had not only begun, but that it had "crystallized" by December of 2007 and its client's admission that the March 2008 statements by President Saca were not understood to have reflected a ban on mining, Claimant's counsel put forth yet another new standard that, if applied, would ensure that no claim of abuse of process could ever succeed. On the final day of the hearing, Mr. Ali stated:

> the temporal determination for abuse of process purposes must be made on the basis of evaluating what concrete acts were taken by the Party asserting jurisdiction to invoke the instrument on which it intends to base its consent and under which it intends to assert its claims.[47]

46. As El Salvador indicated at the hearing, under this standard there could never be abuse of process for change of nationality because the jurisdictional instrument relied on by a claimant committing an abuse cannot be invoked until after the putative claimant changes nationality. This guarantees that the moment of the "temporal determination" would always be after the change of nationality and the change could thus never be abusive. This cannot possibly

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[45] *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, June 10, 2010, para. 206 (RL-51).
[46] This is the standard advocated by Claimant. *See e.g.*, Counter-Memorial, para. 32.
[47] Transcript of Hearing, Day 3, at 744:4-9.

be the standard for determining abuse of process. Claimant has cited *Mobil v. Venezuela* as its source for this standard, but *Mobil* does not establish any such rule. While the parent company in *Mobil* did communicate with Venezuela regarding the dispute prior to the corporate restructuring that was deemed improper with regard to pre-existing disputes, the *Mobil* claimants, like Claimant, did not invoke the instrument on which they based jurisdiction and consent—the 1993 Netherlands-Venezuela BIT—until after the restructuring. Just as Claimant could not have invoked CAFTA prior to its change of nationality, the *Mobil* claimants did not and could not have invoked the BIT prior to their restructuring because, before that time, there was no Netherlands company in the corporate structure.

47. At this point it is relevant to discuss the Tribunal's question regarding the *dictum* in *Maffezini*.[48] The tribunal in *Maffezini* hypothesized that investment disputes develop in specific stages: 1) events that affect the investment; 2) an expression of disagreement and expression of views; and 3) the formulation of legal claims and eventual rejection or lack of response. El Salvador submits that it is not appropriate to apply the *Maffezini* analysis in abuse of process cases. The tribunal in *Maffezini* was addressing a different question: whether a legal dispute existed before or after the relevant bilateral investment treaty came into force. While reference has been made to "pre-existing disputes," the question presented in determining abuse of process is not the same. The fundamental question in abuse of process cases is at what point in the relationship between the parties does it become abusive for an investor to manipulate the corporate form to access the international arbitration system. This different question merits a different answer.

48. Accordingly, tribunals and commentators assessing abuse of process have not applied a *Maffezini* type analysis, which focuses on the last stage of the development of a dispute. Rather, they have focused on the date of the occurrence of the alleged interference with the investment—in the words of the *Mobil* tribunal, the date when the dispute was "born."

[48] Transcript of Hearing, Day 2, at 552:12-19.

49. The Tribunal need not decide in the present case whether manipulation of the corporate form prior to any interference with the investment would be abusive. However, *it is clearly an abuse for an investor to manipulate the nationality of a shell company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration.* It is at this moment that the corporate investor is in a position to manipulate nationality to unilaterally change the rules in its favor with regard to the nascent dispute. The change is just as abusive at this early stage of a dispute as it is at later stages. In either case the investor is treaty shopping *post hoc* to gain a jurisdictional advantage with respect to events that have already occurred.

50. In addition, the investor has substantial control over the stages of the development of the dispute described in *Maffezini*. Because it is the investor who must express disagreement with a government action or omission and the investor who must formulate legal claims, the investor may delay the development of the dispute into these later stages until it has completed the manipulative change of nationality. Relying on this test would permit an investor that is fully aware of a dispute to create access to jurisdiction under a treaty to which it was not entitled at the time of the actions affecting the investment, and at the same time provide no protection to the State from this abusive behavior.

51. Finally, it should be noted that *Maffezini* describes the development of a dispute in abstract terms derived from the facts of the case before that tribunal. Disputes between States and investors, however, are diverse in nature and in the way in which they develop. It would be rare to find any dispute that followed the exact pattern set forth in *Maffezini*. In fact, some disputes are born and crystallize at the very same moment.

1. <u>*Ex post* treaty shopping cannot be considered good faith</u>

52. Bad faith is inherent in the manipulation of corporate nationality to gain access to international arbitration after the alleged interference with the investment has taken place. Claimant's assertion of the existence of an additional affirmative obligation to show subjective

bad faith is unfounded. Such a standard is unsupported by prior arbitral decisions, unnecessary on the facts of this case, unworkable in practice, and ill-advised as a matter of judicial policy. None of the ICSID decisions discussing abuse of process, including *Phoenix Action, Aguas del Tunari,* and *Mobil,* nor any other case establishes such a standard, and for good reason.

53. The findings by the *Phoenix Action*, *Aguas del Tunari*, and *Mobil* tribunals have established a rule for determining abuse of process that is brilliant both for its simplicity of application and its fairness to the parties. It would be a disservice to the investor-State arbitration system to depart from these rulings and create a new and more complicated test. The current rule establishes a clear and logical test based on verifiable facts that permits all parties to understand exactly what conduct constitutes abuse of process. Companies can easily avoid such conduct; States know what conduct they are protected against; and arbitral tribunals can apply the rule consistently in different cases, thus adding substantial judicial certainty to the arbitration process. The new standard advocated by Claimant would eliminate all of these benefits and convert the determination of abuse of process into an indeterminate foray into the assessment of the subjective state of mind of organizations and their officers.

54. The rule proposed by Claimant is particularly unfair to States because it is nearly impossible for a State to prove the mental state of a company or its officers at the time they make the decision to change the nationality of a shell company to gain access to arbitration. States would be subject to abusive behavior with little chance of being able to prove abuse of process.

55. In any event, there are aggravating factors in the present case that leave no doubt as to the existence of bad faith. We refer the Tribunal to the table of misrepresentations included as Annex A to El Salvador's Reply on Jurisdiction, and to the section on Costs below. The admissions at the hearing that the statements by President Saca did not create or announce a *de facto* ban on mining and that the assertion that the primary reason for changing the nationality of Pac Rim Cayman was to save money was false confirm bad faith. Pacific Rim Mining Corp. not only changed Claimant's nationality to initiate this arbitration in bad faith, but Claimant

continued to conduct itself contrary to this fundamental principle by making false and misleading statements to attempt to avoid the consequences of the initial act of bad faith.

C. There were no measures affecting the investment after the change of nationality in December 2007

56. As indicated, in an effort to avoid dismissal because of the abuse of the international arbitration process, Claimant has attempted to argue that its claims are based on a single measure created or announced on March 11, 2008, a *de facto* mining ban. As demonstrated above, no such ban was created or announced by President Saca on that date. In fact no measure of any kind affecting the investment has been taken by El Salvador after December 13, 2007. Therefore, the present case is entirely different from *Mobil v. Venezuela*, where there were two distinct sets of measures at issue: 1) a series of measures including royalty and tax increases that took place before the manipulation of the corporate form in 2006, and 2) the nationalization measures, which took place in 2007 after the reorganization.

57. Here, all of the measures that affected the investment were completed by January 2007 when the El Dorado concession application was denied as a matter of law because Pacific Rim Mining Corp. made a conscious choice not to comply with the law as interpreted by the Government and did not provide the missing documentation in response to the warning letters.

58. At that point, all the harm that could be done to the investment had been done. Without the concession, the company could not proceed to extract gold, and no later actions could cause any further harm. Claimant clearly alleged this when it stated that measures taken between 2004 and 2007 "effectively destroyed" the investment. If the investment was "destroyed" before the change of nationality in 2007, nothing that happened thereafter could be a measure affecting the investment. In fact, after January 2007, Pacific Rim Mining Corp. decided to pressure the Salvadoran legislature to pass a new mining law to eliminate the requirements they did not want to try to meet so they could later get a concession under the new law.

59. There was no new measure taken by El Salvador in 2008. Rather, over the course of the first months of that year the company realized that the new legislation it needed before it could successfully file a new application was not going to pass and it therefore decided to shut down operations. A failure to pass legislation to accommodate an investor is not a measure under CAFTA or a breach of any international law obligation, because a State is under no legal obligation to change its laws to accommodate a foreign investor.

60. Moreover, as explained above, even if Claimant were able to prove the existence of the alleged mining ban, it would not constitute a separate measure that occurred after the change of nationality.[49] It is of note that the *Commerce Group* claimants argued that the mining ban in El Salvador began in 2006. This further indicates that Pac Rim Cayman's allegations regarding the ban as an event taking place in 2008 reflect its efforts to survive the abuse of process objection rather than a recounting of actual facts.

61. After the oral proceedings, the answer to the key question regarding the existence of abuse of process is beyond any doubt: the dispute was foreseeable, arose, developed, and "crystallized" prior to Claimant's change of nationality on December 13, 2007. Because Claimant's change of nationality facilitated its use of the ICSID system as a United States national through both CAFTA and the Investment Law of El Salvador, this entire arbitration must be dismissed.

III. EL SALVADOR HAS PROPERLY DENIED BENEFITS TO CLAIMANT

62. Under CAFTA Article 10.12.2, a CAFTA Party may deny the benefits of the entire Investment chapter, including the dispute resolution section, to an enterprise of another Party if "the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise."[50]

[49] *Commerce Group Corp v. El Salvador*, para. 112 (RL-113).
[50] CAFTA Article 10.12.2 (RL-1).

63. In its pleadings El Salvador demonstrated that the Denial of Benefits provision of CAFTA was properly invoked by El Salvador in this arbitration to deny the benefits of CAFTA Chapter 10 to Claimant. The candid admissions made at the hearing by Claimant's witness, the President and CEO of Claimant's Canadian parent company, Pacific Rim Mining Corp., contradicted Claimant's counsel's arguments and fully confirmed El Salvador's position.

A. Claimant is owned and controlled by persons of a non-Party

1. Under what Claimant concedes is the "determinative" legal standard, Claimant is and has always been owned by "persons of a non-Party"

64. The ownership or control prong of the test for determining if a company is subject to denial of benefits is disjunctive, requiring *either* ownership *or* control by "persons of a non-Party."[51] In this case, Pac Rim Cayman is both owned and controlled by Pacific Rim Mining Corp., a Canadian company.

65. As set forth above and in El Salvador's previous submissions,[52] the Canadian parent has at all relevant times owned 100% of Claimant. Indeed, Claimant has conceded this in writing.[53] Thus, there can be no legitimate dispute that Claimant is owned by a "person[] of a non-Party." This fact alone meets the denial of benefits standard and, the inquiry on ownership and control should end here.

66. Claimant, however, seeks to muddy the waters with a two-part argument that fails on the law and the facts. First, it urges that the Tribunal—contrary to the plain language of CAFTA—base its decision not on ownership of Claimant, but on the ownership of Claimant's *parent* company, Pacific Rim Mining Corp. Second, it asserts that, because it claims that the majority of the publicly-traded shares of the Canadian parent are held by persons with U.S.

[51] CAFTA Article 10.12.2.
[52] Memorial, paras. 111-112; Reply, paras. 131-146.
[53] Counter-Memorial, para. 326.

addresses,[54] then it must follow that the Canadian parent company is owned by persons of a Party. Both parts of this argument are spurious.

67. First, it is irrelevant that the Canadian company might have U.S. shareholders. Regardless of who Pacific Rim Mining Corp.'s shareholders might be, the fact remains that *Claimant* is wholly owned by "persons of a non-Party." Second, Claimant has not even provided proof that its Canadian parent is owned by nationals of the United States. Claimant concedes that Chapter 10 of CAFTA defines "national" as "a natural person who has the nationality of a Party according to Annex 2.1 (Country-Specific Definitions)."[55] And Annex 2.1 states that, for the United States, "'a natural person who has the nationality of a Party' means 'national of the United States' as defined in the existing provisions of the *Immigration and Nationality Act*."[56] The Immigration and Nationality Act defines a "national of the United States" as either "(A) a *citizen* of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[57]

68. Claimant's evidence relating to shareholding of the Canadian parent does not demonstrate that it is owned by a national of the United States under this definition. Indeed, Claimant does not even purport to make such a showing, being careful to note that all it can show is share ownership of the Claimant's Canadian parent by *shareholders residing in the United States*, which is quite a different concept than U.S. *nationals*.[58] There are many natural and juridical persons with addresses in the United Sates who are not nationals.

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[54] Transcript of Hearing, Day 3, at 725:14-19 ("we submit that for purposes of the denial-of-benefits analysis under Article 10.12.2, Pac Rim Cayman is both owned and controlled by U.S. nationals by virtue of the fact that a majority of the Shareholders of its parent, Pacific Rim Mining Corp., are persons with addresses in the United States") (emphasis added).
[55] Counter-Memorial, para. 328.
[56] Counter-Memorial, para. 328; CAFTA Annex 2.1 (CL-73). *Accord,* Non-Disputing Party Submission of the Republic of Costa Rica, May 20, 2011, para. 16 ("With respect [to] the United States, the nationality of a natural person is determined in accordance with the *Immigration and Nationality Act*.").
[57] 8 U.S.C. § 1101 (a)(22) (emphasis added) (RL-109).
[58] *See, e.g.*, Counter-Memorial, paras. 327-329; Rejoinder, paras. 177-180; Pasfield Witness Statement, paras. 12-16 (explaining that his company provides Pacific Rim Mining Corp. with summary information about the geographic distribution of the beneficial owners of the company's shares).

69. It would violate basic principles of treaty interpretation to ignore such a carefully crafted treaty definition as "person of a Party"—which, in the case of the United States points to a specific definition in a specific statute, the Immigration and Nationality Act—and instead substitute what Claimant argues are "rules of thumb" used by *different* U.S. agencies for *different* purposes, not involving a definition in an international treaty.[59] Any decision by this Tribunal equating having a U.S. address with the concept of "person of a Party" would be manifest error, particularly given that Claimant has *conceded* that "the manner in which U.S. Law (*in particular, the Immigration and Nationality Act)* defines and uses the concepts of nationality and residence is *determinative* for purposes of construing the meaning of these terms with respect to U.S. nationals and permanent residents."[60] In any event, because Claimant has not even identified who these U.S. persons might be, it is impossible to test its assertions about ownership.

70. In sum, there is no dispute that Claimant has always been 100% owned by its Canadian parent, a "person[] of a non-Party," and Claimant has provided no valid arguments and no evidence to refute that this means that Claimant is subject to denial of benefits under the own or control clause of CAFTA 10.12.2.

2. The President and Chief Executive Officer of Pacific Rim Mining Corp. has now conceded that Pacific Rim Mining Corp. controls Claimant

71. Because Pac Rim Cayman is indisputably 100% owned by its Canadian parent, this Tribunal need not reach the issue of whether Claimant is also "controlled" by its Canadian parent. Nonetheless, should the Tribunal consider this issue, it would find this test easily satisfied as well.

72. Because Pacific Rim Mining Corp. is the sole owner of Claimant, and Claimant has no independent business management, Pacific Rim Mining Corp. by definition controls

[59] Vienna Convention on the Law of Treaties, Art. 31, May 23, 1969, 1155 U.N.T.S. 331 (RL-81). *Cf.* Counter-Memorial, para. 329 (asserting that although the evidence "does not indicate the nationality of Pacific Rim's shareholders," this Tribunal should consider residence "as a proxy for nationality" and "deem[]" shareholders with addresses in the United States U.S. nationals for purposes of CAFTA).
[60] Counter-Memorial, para. 328 (emphasis added).

Claimant. All decisions regarding Claimant referred to in these proceedings have been taken by Pacific Rim Mining Corp. through its Board of Directors or its officers. If there had been any doubt in this regard, it was dispelled by the testimony of the President and CEO of Pacific Rim Mining Corp. During Mr. Shrake's cross-examination he was shown an organizational chart, prepared by Claimant, which depicts the organization of the Pacific Rim family of companies as provided for in the December 4, 2007 resolution of the Pacific Rim Mining Corp. Board of Directors.[61] Mr. Shrake asked to approach the board where the chart was displayed, and he circled the companies which were owned, directly or indirectly, by the Canadian parent.[62] The Claimant, Pac Rim Cayman, was one of the companies he circled. Then, he gave an unequivocal answer to a simple question about control of those companies by the Canadian parent:

> Q: And does Pacific Rim Mining Corp. also control all of these companies you just circled?
>
> A: Yes.[63]

73. Claimant cannot escape this admission that Claimant is controlled by Pacific Rim Mining Corp. which, as a Canadian corporation, is a "person[] of a non-Party."

74. Seeking to divert the Tribunal from this fatal admission, Claimant focused on Mr. Shrake's residence and personal involvement with the management of Claimant, adducing facts to show that Mr. Shrake individually a) is a U.S. citizen who resides in the United States and b) exercises control over Claimant. Specifically, Claimant's counsel elicited testimony that Mr. Shrake made the decisions: to sell Claimant's Argentine assets in 2001; as to how those assets would be reinvested; relating to the corporate reorganizations in 2004 and 2005; and to make the late 2007 change in nationality of Claimant from the Cayman Islands to Nevada.[64] But none of

[61] Organizational Chart, The Pacific Rim Companies' Organization As Provided For In The 4 December 2007 Resolution Of The Board of Directors (C-57).
[62] Transcript of Hearing, Day 2, at 506:20 – 507:11. The circled version of C-57 was marked as R-126.
[63] Transcript of Hearing, Day 2, at 507:12-14.
[64] Transcript of Hearing, Day 2, at 512:17 – 513:22.

this changes the fact that Mr. Shrake has admitted that the Canadian parent "controls" the Claimant.[65]

75. Indeed, it strengthens that conclusion, as he admitted that he made all these decisions as President and CEO of Pacific Rim Mining Corp., in conjunction with its Board of Directors:

> Q: Are you able to point to any documentation you're aware of that suggests that Pac Rim Cayman ever had a Board of Directors?
>
> A: Pac Rim Cayman, again, is a holding company. The Board of Directors of Pacific Rim Mining Corp. is – and myself as the Chief Executive direct Pac Rim Cayman as a holding company.
>
> Q: You say the Board of Directors of Pacific Rim Mining Corp. direct Pac Rim Cayman. You're talking about the Board of Directors of the Canadian Compan[y]; correct?
>
> A: Yes.[66]

76. The most relevant example of exercise of corporate control in this arbitration proves who controls Claimant. It was the Board of Directors of Pacific Rim Mining Corp., the Canadian company, not any "person of a Party," who made the decision to change Pac Rim Cayman's nationality from the Cayman Islands to the United States in December 2007.[67]

77. Claimant's additional argument that the unknown, unidentified, alleged U.S. resident shareholders of the parent company control Pac Rim Cayman is equally far-fetched. In its written materials, Claimant alleged that the unidentified shareholders control Pacific Rim

[65] Claimant seems to suggest that because Mr. Shrake is also formally designated as a manager for Pac Rim Cayman before the state of Nevada, all of Mr. Shrake's activities mean that a U.S. person "controlled" Claimant. But Mr. Shrake's title as a "manager" of Pac Rim Cayman is nothing more than a formal requirement with the State of Nevada, and there is nothing to manage in Pac Rim Cayman, because as Mr. Shrake himself has admitted, Pac Rim Cayman is only a "holding company" whose sole purpose and activity is to hold shares. Transcript of Hearing, Day 2, at 445:13-15.
[66] Transcript of Hearing, Day 2, at 492:6-17.
[67] Consent Resolution of the Directors of Pacific Rim Mining Corp., Dec. 4, 2007 (C-58).

Mining Corp., and then, without citing any evidence or authority, claimed that the unidentified U.S. resident shareholders of the parent company indirectly control Pac Rim Cayman.[68]

78. First, this argument suffers from the same flaws as Claimant's indirect ownership argument—Claimant has not alleged, much less shown, that the alleged majority shareholders residing in the United States are "persons of a Party" for purposes of CAFTA.

79. Second, even if Claimant could show that the majority owners of Pacific Rim Mining Corp.'s shares were U.S. nationals, there is no evidence supporting the claim that these shareholders would control Claimant. If the company cannot even identify the alleged shareholders, making it difficult to determine "with any precision the citizenship of the Shareholders,"[69] it is obvious that those unknown, anonymous shareholders do not come together to exercise control over Claimant Pac Rim Cayman.

80. In short, Claimant's Canadian parent is the sole, 100%, owner of Claimant. Mr. Shrake unequivocally admitted that the Canadian parent company, a "person[] of a non-Party," controls Claimant, and that such control was exerted both by him acting as the "Chief Executive" of the Canadian parent, and by the Board of Directors of the Canadian parent. Claimant has completely failed to identify any "person of a Party" who controls Claimant. It is difficult to fathom a more clear-cut case of control by "persons of a non-Party" than this.

B. Claimant has never had "substantial business activities" in the United States

81. Mr. Shrake's testimony at the hearing confirmed the facts regarding Claimant's lack of business activities demonstrated by El Salvador's evidence. He testified that Claimant does *nothing* other than hold shares.[70] It has no employees, leases no office space, and has no bank account.[71] Contrary to the suggestion made by Claimant's counsel throughout their briefs,[72]

[68] Counter-Memorial, para. 331; Rejoinder, paras. 191-194.
[69] Transcript of Hearing, Day 1, at 261:22 – 262:1.
[70] Transcript of Hearing, Day 2, at 445:13-15.
[71] Transcript of Hearing, Day 2, at 445:2 – 446:7.
[72] Counter-Memorial, para. 377; Rejoinder, para. 147.

Mr. Shrake admitted that Claimant performs no exploration activities.[73] Similarly, Mr. Shrake testified that all the intellectual property, which Claimant had repeatedly mentioned as a factor in the substantial business activities analysis because of its alleged U.S. origin,[74] and indeed "everything" that went into El Salvador in connection with this project, was contributed not by Claimant, but by another company.[75] In short, Mr. Shrake confirmed that Claimant has no physical existence whatsoever other than its name on some documents.[76] Thus it cannot possibly have substantial business activities.

82. Nor were the alleged investments in El Salvador made either by Claimant or from the United States. El Salvador provided unrefuted evidence that the wire transfers came from Canadian companies, either Pacific Rim Mining Corp. or its predecessor.[77] And Mr. Shrake publicly confirmed that fact in a July 2008 press release.[78] Claimant's only "response" to this evidence is a fragmentary page from an unconsolidated, apparently unaudited balance sheet that purports to show Claimant carrying an investment in El Salvador as an "asset."[79] As noted at the hearing, however, this says nothing about whether Claimant made the investments in the first place; all it shows, at best, is that at some unidentified time this asset appeared on the books to Claimant. This thinly documented indication of apparent ownership of an asset located in El Salvador cannot constitute "substantial business activities" in the United States.

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[73] Transcript of Hearing, Day 2, at 493 – 500.
[74] Counter-Memorial, paras. 80, 86, 92, 248; Rejoinder, paras. 3, 28.
[75] Transcript of Hearing, Day 2, at 511:18 – 512:2.
[76] Transcript of Hearing, Day 2, at 445:2 – 446:7.
[77] Letter from PRES to ONI, received July 14, 2005, including auditor's certification and certifications from Banco Hipotecario and Banco de Comercio, April 2005 (R-103); Letter from PRES to ONI, received Aug. 28, 2006, including certification of Scotiabank, El Salvador, July 28, 2006 (R-104); Resolution 368-MR, July 30, 2008, including Certification of Scotiabank, El Salvador, Nov. 15, 2007 (R-105); Certification of Scotiabank, El Salvador, Oct. 21, 2008 (R-107).
[78] Pacific Rim Mining Corp., News Release, "Pacific Rim Suspends Further Drilling in El Salvador Until Mining Permit Granted; Local Staffing Reduced," July 3, 2008 (Annex H to Parada Witness Statement) ("the Company can not continue to invest millions of dollars annually in advancing its El Salvador gold projects, particularly El Dorado . . . ."). *See* Transcript of Hearing, Day 2, at 488:1 – 489:15 (confirming that the reference to "the Company" means Pacific Rim Mining Corp. of Canada).
[79] Pac Rim Cayman, Non-Consolidated Balance Sheet (C-Protected-1).

83. If merely holding shares were enough to defeat the denial of benefits, as suggested by Claimant, then the entire purpose of the denial of benefits provision would be eviscerated, as all enterprises who passively held shares would qualify as investors who could enjoy treaty protections. This surely cannot be the proper interpretation of the Treaty.

84. In short, Claimant had no business activities at all in the United States, at any time—much less "substantial" business activities. The text of the Treaty is clear that the activities at issue must be those of "the enterprise", *i.e.*, Claimant, and not of some other entity, and other tribunals faced with the same issue have agreed that a claimant cannot get credit for the business activities of other, associated entities for purposes of a "denial of benefits" clause.[80]

C. El Salvador provided the notice required by CAFTA

1. No invocation of denial of benefits is required before the arbitration

85. Unable effectively to contest that the CAFTA denial of benefits provision applies to this case, Claimant argues that El Salvador's notice of such denial of benefits was untimely.[81] As set forth below, accepting Claimant's argument would engraft onto CAFTA requirements and deadlines that are not there and create all manner of practical difficulties that would effectively eviscerate the denial of benefits provision.

86. First, as demonstrated in El Salvador's written submissions, the plain language of CAFTA sets forth the requirements of the invocation of the denial of benefits provision.[82] Notably, nowhere does the Treaty impose a time limit on such an invocation. As correctly noted by the United States in its Non-Disputing Party Submission, "Article 10.12.2 does not impose any requirement . . . with respect to *when* a respondent may invoke the denial of benefits

[80] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, para. 169 (RL-66).
[81] Counter-Memorial, Section V.C; Rejoinder, Section IV.C.
[82] CAFTA Article 10.12.2; Memorial, paras. 212-217; Reply, paras. 157-165.

provision."[83] The Republic of Costa Rica agrees "that denial of benefits may occur at any time, regardless even of the existence or not of an investment arbitration."[84]

87. Moreover, as is clear from the State Parties' views that an invocation of the denial of benefits provision is appropriate after arbitration is initiated, invocation of the denial of benefits clause is not unilateral withdrawal of consent as prohibited by Article 25(1) of the ICSID Convention.[85] The State is not withdrawing consent. The general consent expressed in Article 10.17 of CAFTA, to "the submission of a claim to arbitration under this Section in accordance with this Agreement," remains intact. But in accordance with the Parties' agreement, there simply is no consent to arbitrate disputes with an enterprise that meets the conditions of Article 10.12. An investor of a non-Party cannot enjoy the benefits of CAFTA, and the denial of benefits provision simply protects States and their nationals from free-riding non-Party investors improperly invoking the State's consent to arbitration. As an objection to jurisdiction, it is no different from any other assertion of lack of consent, and must be raised at the proper time in the proceedings.

88. Thus, the timing of El Salvador's invocation of the denial of benefits provision on August 3, 2010 (the day after the Tribunal's decision on Preliminary Objections) was perfectly appropriate. This permitted the Tribunal to consider the denial of benefits issue, as it is doing, with other objections to jurisdiction. The United States agrees that this notice was timely, noting that "[t]here is no basis to read into the plain language of Article 10.12.2 a requirement that a

[83] Non-Disputing Party Submission of the United States of America, May 20, 2011, para. 5 (emphasis in original).

[84] Non-Disputing Party Submission of the Republic of Costa Rica, para. 6. As conceded by El Salvador at the hearing in response to one of the Tribunal's questions, however, it does not follow from the lack of a deadline that a Party may wait until after an applicable Award to attempt to invoke the denial of benefits provisions for measures at issue with respect to the investor in that arbitration. Transcript of Hearing, Day 3, at 646:18 – 647:1. Apart from considerations of good faith, under the ICSID Rules, a "party which knows or should have known that a provision of . . . any other rules or agreement applicable to the proceeding . . . has not been complied with and which fails to state promptly its objections thereto, shall be deemed . . . to have waived its right to object." ICSID Arbitration Rule 27. Costa Rica concurs that a Party cannot wait until an arbitration has concluded and an Award has been issued in order to invoke the denial of benefits provision. Non-Disputing Party Submission of the Republic of Costa Rica, para. 7.

[85] *Cf.* Transcript of Hearing, Day 1, at 250:15 – 253:11 (arguing Article 25(1) places a time limit on when a State can invoke the denial of benefits).

Party assert its right to deny benefits before the commencement of arbitration;" but rather, denial of benefits may be invoked "as part of a jurisdictional defense after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement."[86]

89. A rule requiring that the denial of benefits protections of CAFTA must be invoked prior to the initiation of the arbitration would also lead to all sorts of practical monitoring and administrative difficulties. As the United States observes:

> Requiring the respondent to invoke the denial of benefits provision before a claim is filed would place an untenable burden on that Party. It would require the respondent, in effect, to monitor the ever-changing business activities of all enterprises in the territories of each of the other six CAFTA-DR Parties that attempt to make, are making, or have made investments in the territory of the respondent. This would include conducting, on a continuing basis, factual research, for all such enterprises, on their respective corporate structures and the extent of their business activities in those countries. To be effective, such monitoring would in many cases require foreign investors to provide business confidential and other types of non-public information for review. Requiring CAFTA-DR Parties to conduct this kind of continuous oversight in order to be able to invoke the denial of benefits provision under Article 10.12.2 before a claim is submitted to arbitration would undermine the purpose of the provision.[87]

[86] Non-Disputing Party Submission of the United States of America, para. 5. The United States also agrees that the plain reading of the Treaty language requires the conclusion that the denial of benefits provision is jurisdictional, because its invocation denies an enterprise both the substantive provisions and the dispute settlement provisions of Chapter 10. Non-Disputing Party Submission of the United States of America, para. 5, n.6. *See also* Memorial, paras. 200-207; Reply, paras. 175-176.

[87] Non-Disputing Party Submission of the United States of America, para. 6. In support of the common sense approach that the time to invoke the denial of benefits provision is in the course of any relevant arbitration, the United States, like El Salvador, cites to the Meg N. Kinnear article relating to Denial of Benefits under NAFTA which states: "Given that a Party cannot know which enterprises in another Party may some day attempt to file a NAFTA Chapter 11 claim, and given the rapidity with which ownership and control of a corporation may change, [the prior notification requirement under NAFTA Article 1113.2] *cannot mean that a Party needs to notify the other Party before a claim is submitted to arbitration* under Chapter 11." Non-Disputing Party Submission of the United States of America, para. 6, n.7 (emphasis in original) (quoting Article 1113 - Denial of Benefits, *in* Investment Disputes under NAFTA, An Annotated Guide to NAFTA Chapter 11 (Meg N. Kinnear, Andrea K. Bjorklund et al. eds., 2006) (RL-63)).

90. The Republic of Costa Rica also described the administrative nightmare that would ensue if Claimant's timing requirement were engrafted onto the Treaty and concluded, correctly, that "[f]ailing to allow the invocation of the denial of benefits clause even when an investment arbitration has already commenced deprives this provision of any effectiveness."[88]

91. *Amici curiae* reached the same conclusions and observed that such a requirement "would necessarily be expensive for the party" which may, like El Salvador, "be facing serious imperatives regarding poverty alleviation and the attainment of the millennium development goals."[89] Indeed, *amici* agree with the United States that even if, theoretically, a CAFTA Party could establish and maintain the "required system of pre-investment investigation and post-investment monitoring of a foreign investor's ownership structure," such a system would also be "intrusive for the investor, creating more bureaucratic hurdles and as such likely reducing foreign investment, not increasing it."[90]

92. The circumstances of this case amply demonstrate the inappropriateness of requiring a State Party to invoke denial of benefits prior to the commencement of arbitration. El Salvador did not even have any notice that Claimant had its nationality changed to that of the United States until June 2008,[91] and even then the notice was not volunteered by Claimant but given in response to a comment by El Salvador's National Investment Office that there was some missing information in an attempted registration of a foreign investment.[92] El Salvador would not then have had any reason to believe that Pac Rim Cayman was going to be a claimant under CAFTA or whether, in such case, El Salvador could invoke the denial of benefits provision.

93. Nor is there any textual support to require invocation of denial of benefits in the short 90 day period between receipt of the Notice of Intent and the filing of the Notice of

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[88] Non-Disputing Party Submission of the Republic of Costa Rica, para. 13.
[89] *Amicus Curiae* Submission by Member Organizations of *La Mesa Frente a la Minería Metálica de El Salvador* (The El Salvador National Roundtable on Mining), May 20, 2011, at 13.
[90] *Amicus Curiae* Submission at 13.
[91] Letter from PRES to ONI, received June 16, 2008 (requesting that ONI register the change of nationality of Pac Rim Cayman from the Cayman Islands to the United States) (R-113).
[92] Letter from ONI to PRES, Apr. 9, 2008 (requesting clarification of the name of the foreign investor for a requested registration) (R-116).

Arbitration. As noted by the United States, "there is no basis in the plain language of CAFTA-DR to suggest that a respondent is required to invoke Article 10.12.2 between the submission of a claimant's notice of intent and notice of arbitration."[93] It would be unreasonable to require States to try to hire counsel, complete the necessary research, vet the decision to deny benefits with the appropriate government agencies, and invoke their right to deny benefits all within 90 days of receiving each Notice of Intent, especially where the Notice of Intent may not even be followed by the initiation of an arbitration. [94]

94. Moreover, as the United States explains, "Article 10.16.2 . . . requires that a notice of intent include a claimant's 'name and address,' but Article 10.16.2 does not require a claimant to disclose the extent of the claimant's business activities in the territory of any CAFTA-DR Party or the names of any persons or entities that own or control the claimant enterprise."[95] In this case, Claimant's disclosures in the Notice of Intent were cursory and misleading. For example, the Notice of Intent asserted that Claimant was an "American investor"[96] and that it was "predominantly managed and directed from its exploration headquarters in Reno, Nevada."[97] But, as demonstrated in El Salvador's briefing and through testimony at the hearing, Claimant never made any investment in El Salvador, so it was not an "investor," American or otherwise.[98] Moreover, Claimant failed to disclose in its Notice of Intent that any "exploration" management and direction which took place in Nevada was either attributable to a *different* United States corporation, Pacific Rim Exploration, or to Mr. Shrake acting not for Claimant, but for the Canadian parent company.[99]

95. El Salvador had partially completed its investigation into Claimant's ownership and activities by March 1, 2010 when it provided the U.S. Trade Representative a notification

[93] Non-Disputing Party Submission of the United States of America, para. 7.
[94] Transcript of Hearing, Day 3, at 647:20 – 648:6.
[95] Non-Disputing Party Submission of the United States of America, para. 7.
[96] Notice of Intent, Introduction.
[97] Notice of Intent, para. 6.
[98] Memorial, paras. 170-172; Reply, paras. 113-114; Transcript of Hearing, Day 2, at 489:5 – 490:10.
[99] Transcript of Hearing, Day 2, at 492:6 – 493:3, 493:11-17.

letter of its intent to deny benefits,[100] but continued its investigation thereafter until it ultimately invoked the Denial of Benefits protection before this Tribunal on August 3, 2010, and even beyond that date.[101] In addition to allowing the U.S. Government time to respond to its notification, El Salvador had to wait until the Decision on the Preliminary Objections to request that the Tribunal order Claimant to produce additional information and documents that only Claimant possessed. Based on the available information, El Salvador believed that Claimant had no bank account, no leases, no employees, and no tax records. But El Salvador could only know for certain after Claimant responded to its request for information and documents.

2. Claimant has failed to allege any prejudice from the timing of the notice

96. It is telling that in its reams of submissions to this Tribunal on the issue of denial of benefits, Claimant is unable to articulate how it has been prejudiced in any manner by the timing of El Salvador's notice of the invocation of denial of benefits. The reason for its silence is that it has not been prejudiced.

97. First, as a matter of simple treaty interpretation, Claimant, as a putative investor, was not entitled to any notice whatsoever.[102] The United States summarizes the Treaty language and its effect as follows:

> On its face, Article 18.3 requires a CAFTA-DR Party, to the maximum extent possible, to provide notice to one or more other CAFTA-DR Parties of certain "proposed or actual" measures as

[100] Denial of Benefits Notification Letter from El Salvador to the United States Trade Representative, Mar. 1, 2010 (R-111).
[101] As noted at the hearing in response to the Tribunal's question, El Salvador does not consider this to be a five-month "delay." Rather, given the fact that this is the first time that the Denial of Benefits provision under either CAFTA or NAFTA has been invoked, it was El Salvador's intent to provide notice to the affected State Party, the United States, as soon as practicable and, indeed, before such notice was legally required by the provisions of the treaty. The most directly affected Party (and, indeed, the only Party with standing to complain) has never asserted any alleged prejudice from the timing of these events. Rather, the United States maintains, in its Non-Disputing Party submission, that this timing was appropriate.
[102] Memorial, para. 214; Reply, paras. 157-161.

> described in the provision. There is no mention of notice to claimants in Article 18.3, and none is required.[103]

98. Second, even Claimant concedes that El Salvador could not possibly have denied benefits before Claimant had become a national of a CAFTA party, in December 2007.[104] But Claimant has failed to rebut El Salvador's evidence that by that time over 93% of the alleged investment in El Salvador would have already been made.[105] Thus, even if (contrary to the facts) this Tribunal were to give Claimant credit for investments made by its Canadian parent before Claimant's nationality was changed, there could have been no legitimate expectations of being protected by CAFTA during virtually all of the investment period.

99. Claimant's only, strained, argument that it has been prejudiced in any way is its convoluted contention that somehow the timing of the notice of denial of benefits would prevent the United States from engaging in the CAFTA Article 20.4 consultation procedures for fear that such participation would be interpreted as an inappropriate grant of "diplomatic protection" in contravention of Article 27 the ICSID Convention.[106] If there were any merit to this argument, it would be the United States, not Claimant, who would have standing to raise this objection. The United States not only did not raise the argument, but clearly rejected it when it filed its Non-Disputing Party Submission agreeing with El Salvador and Costa Rica that the denial of benefits provision in CAFTA can be invoked by the Respondent State even after arbitration has begun.[107]

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[103] Non-Disputing Party Submission of the United States of America, para. 10. Similarly, Costa Rica notes that "the State denying benefits fulfils the notification requirement by addressing the State Party affected. Neither Article 10.12.2, nor Article 18.3, nor any other provision of DR-CAFTA require the State denying benefits to address any communications to the individual concerned." Non-Disputing Party Submission of the Republic of Costa Rica, para. 3.

[104] Rejoinder, para. 200.

[105] Certification of Scotiabank, El Salvador, Oct. 21, 2008 (showing that after Claimant was moved to the United States, the company only sought to register $5.3 million investment) (R-107). Indeed, after June 2008, when El Salvador first received notice of Claimant's change in nationality, there was only $1.7 million alleged investment. Certification of Scotiabank, El Salvador, Oct. 21, 2008 (R-107). *See* Transcript of Hearing, Day 1, at 99:10 – 100:14.

[106] Counter-Memorial, paras. 345-353; Rejoinder, paras. 201-209.

[107] Non-Disputing Party Submission of the United States of America, para. 5 ("Neither [Article 10.12.2.] nor any other provision of CAFTA-DR precludes a Party from invoking the denial of benefits provision at an appropriate time, including as part of a jurisdictional defense after a claim has been submitted to arbitration, to deny a claimant enterprise benefits under the Agreement."). This submission renders the

100. The proper time to invoke the denial of benefits is the time limit for raising jurisdictional objections. El Salvador provided notice to the United States five months before invoking the denial of benefits provision. This early notice was intended precisely to give the United States ample opportunity to evaluate the information provided and, if necessary, initiate consultations if the United States had desired to do so.

101. All of Claimant's CAFTA claims must be dismissed on the basis of El Salvador's invocation of the denial of benefits protection of CAFTA.

IV. JURISDICTION RATIONE TEMPORIS

102. While it is clear from the above that this arbitration must be dismissed based on Abuse of Process and denial of benefits, the fact that Pac Rim Cayman was not a U.S. national until December 2007 also has jurisdictional implications beyond abuse of process. As a starting point, El Salvador wanted Claimant to accept that it cannot claim with respect to any time before Claimant's change of nationality in December 2007: i) status as an investor of the United States, ii) CAFTA protection, iii) any breaches of CAFTA, or iv) damages for any measures, acts, or facts that took place before that date. Claimant conceded this at the hearing, and more.

103. In a futile, last-minute effort to survive El Salvador's Abuse of Process objection, Claimant was also forced to concede that Pac Rim Cayman cannot claim any breaches or damages under CAFTA or of the Investment Law of El Salvador, with respect to anything that took place before March 2008. Mr. Posner said on the final day of the hearing: "let me be very clear: with respect to our claim for damages, we are only asking for damages as a result of the breach that we became aware of and that we only could have become aware of in--as of March 2008 at the earliest."[108] Mr. Posner went on to clarify that this statement applies to all claims in this arbitration, both in the proceeding under CAFTA and in the proceeding under the Investment Law. Mr. Posner said:

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new authority submitted by Claimant at the hearing entirely irrelevant. *See also* Non-Disputing Party Submission of the Republic of Costa Rica, para. 5.

[108] Transcript of Hearing, Day 3, at 719:1-5.

> let me just emphasize in response to the Tribunal's question as to whether the measure at issue is the same for the CAFTA claims and the Investment Law claims, it is. In both cases the measure at issue is the de facto mining ban. Also, as I said earlier, in both cases, Claimant is alleging damages only from the period from March 2008 forward and not from any earlier period.[109]

104. As El Salvador demonstrated in discussing Abuse of Process, the measures at issue in this arbitration have always been that the environmental permit and the mining exploitation concession for El Dorado were not issued—which occurred from 2004 to 2007.

105. At the hearing, President Veeder asked counsel for Claimant to identify the date of the measure at issue, which counsel was unable to identify.[110] Professor Stern then pressed on the question, also without success, and asked counsel to clarify, in writing, whether Claimant's case was that the alleged measure at issue was either a continuing or a composite act, both being different concepts in international law.[111] As noted above, Claimant has not identified the date of the measure at issue, instead, it has identified when it allegedly "became aware" of the measure. This response does not assist Claimant's argument that there is a measure covered by the Treaty that occurred after the change of nationality, over which CAFTA could apply, and over which this Tribunal could assert jurisdiction. The reason is that there is no such measure. El Salvador refers the Tribunal to Section II.C above, to show that there is no such measure.

106. In any event, the only measures at issue in this arbitration are not composite or continuing acts because they all occurred prior to Claimant's change of nationality and thus never constituted breaches of the Treaty. Articles 14 and 15 of the ILC Draft Articles cover "breaches" having a continuing character and "breaches" consisting of a composite act.[112] If there is no breach because a certain measure is not covered by the relevant treaty, which is here the case as all measures occurred and were exhausted prior to the change of nationality, there is simply no

[109] Transcript of Hearing, Day 3, at 724:10-17. *See also* Transcript of Hearing, Day 3, at 719:1-9.
[110] Transcript of Hearing, Day 3, at 709:22; 710:1-22; 715:9-22 and 719:10-16.
[111] Transcript of Hearing, Day 3, at 715:9-22 and 719:10-16.
[112] *Report of the International Law Commission on the work of its fifty-third session*, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries thereto" U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) Arts. 14, 15 ("ILC Draft Articles") (RL-79).

question involving continuing or composite acts. Indeed, in *MCI v. Ecuador* the claimants argued that certain acts by Ecuador constituted continuing or composite acts. The tribunal noted that Articles 14 and 15 of the ILC Articles referred to international wrongful acts, which can only occur after a treaty has entered into force. The tribunal further noted that the claimants' arguments with respect to the "relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the BIT, there was no possibility of breaching it."[113]

107. A continuing act is one which starts as a breach and continues as a breach.

108. Composite acts are limited to:

> obligations which concern some aggregate of conduct and not individual acts as such. In other words their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.[114]

109. As El Salvador has explained in its written submissions, there were only two applications at issue with regard to El Dorado, one for the environmental permit and one for the mining exploitation concession in El Dorado. The measures affecting those applications had occurred and had their effects before December 2007. In fact, Claimant's parent, Pacific Rim Mining Corp., had conceded to its investors in mid-2007 that it did not expect to receive the El Dorado concession under the existing mining law, and that its application could only be approved after passage of a new mining law.[115] Therefore, the alleged measures affecting Claimant's investment occurred before December 2007, *i.e.*, before the time for which Claimant admits it can allege breaches and damages. As other tribunals in similar situations have held, if

[113] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, para. 93 (RL-84).
[114] ILC Draft Articles, Art. 15, Commentary (2) (emphasis added).
[115] Pacific Rim Mining Corp., 2007 Annual Report (Canada) at 10 (R-37).

the alleged breach already occurred, the fact that there is still no compensation does not extend the life of the breach or turn the measure at issue into a continued act.[116]

110. El Salvador requests that the Tribunal take note of Claimant's concessions regarding the date from which it can allege claims and damages and apply them to its findings with regard to the facts and measures at issue in this arbitration. Such application can only lead to the conclusion that there is no jurisdiction over the claims related to El Dorado both under CAFTA and the Investment Law, as all the relevant facts and measures took place before December 2007, and Claimant admits that it has no claim for any measure before March 2008.

111. In addition, because Pac Rim Cayman has not made any investments in El Salvador, before or after the change of nationality, Pac Rim Cayman does not qualify as an "investor of a Party."[117]

112. Finally, as explained in El Salvador's written submissions, CAFTA imposes a three-year time limit to bring CAFTA claims. The three-year time limit starts counting from the time Claimant knew or should have known of the alleged breach and that damages had occurred. It is undisputed that by December 2004, Pacific Rim had notice that MARN did not issue the environmental permit within the statutorily mandated adjudication period and that it had suffered damages as a result.[118] It is this failure to issue the permit that constitutes the initial alleged breach of El Salvador's obligations under CAFTA and started the clock on the three-year limit. Even if the three-year time limit to bring claims in arbitration about the El Dorado dispute did not start until CAFTA entered into force on March 1, 2006, Pac Rim Cayman did not file its Notice of Arbitration within three years of that date.

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[116] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, para. 70 (RL-82) ("The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.").
[117] *See* Part III.B above for information about the origin of the investments. El Salvador argues that it is not the date of change of nationality that controls, but the date on which the change of nationality was reported to El Salvador as required by El Salvador's laws. That date was June 2008 (Letter from PRES to ONI, received June 16, 2008 (R-113)).
[118] Letter from PRES to Minister of the Environment, Dec. 15, 2004 (R-55).

V. THERE IS NO JURISDICTION UNDER THE INVESTMENT LAW

113. As explained at the hearing, there are six independent reasons why the Tribunal must reject Claimant's attempt to invoke a purported second instrument of consent, the Investment Law. El Salvador refers the Tribunal to its written pleadings regarding these independent reasons, many of which remain unanswered by Claimant. What follows is a short discussion of some points raised at the hearing.

114. It is fundamental to recall that Claimant initiated a concurrent international arbitration under the Investment Law based on the same measures as the CAFTA proceeding and argued that they were so tightly linked that the CAFTA waiver did not require the dismissal of proceedings on the Investment Law. Now that Claimant has sensed that its CAFTA proceeding will be dismissed, however, Claimant is seeking to detach the Investment Law proceeding from the failing CAFTA proceeding and have it survive with an independent life of its own.

A. A finding of abuse of process requires dismissing the Investment Law proceeding in addition to the CAFTA proceeding

115. Contrary to what counsel for Claimant alleged at the hearing, the abuse of process by changing its nationality after the dispute had already started clearly assisted Claimant in its initiation of arbitration proceedings under the Investment Law.[119] Therefore, a finding of abuse of process regarding the change of nationality also affects Claimant's invocation of protection and jurisdiction under the Investment Law.

116. It is undisputed that the real party in interest in this dispute, the Canadian parent of the manufactured claimant, could not have initiated ICSID arbitration against El Salvador. Claimant tries to make use of the possibility that the shell company subsidiary Pac Rim Cayman could have initiated a proceeding under the Investment Law without changing nationality, but the fact is that it did not.[120] Instead, the Canadian company decided to change Claimant's nationality, and Pac Rim Cayman initiated both international arbitration proceedings—the

[119] Transcript of Hearing, Day 3, at 746:1-8.
[120] Transcript of Hearing, Day 3, at 746:14-19.

CAFTA proceeding and the Investment Law proceeding—claiming to be a "U.S. investor organized under the laws of Nevada, United States of America . . . . [and] an environmentally and socially responsible mining company dedicated to the exploration, development, and extraction of precious metals in the Americas."[121] So, when the Canadian parent changed the nationality of Pac Rim Cayman, moved another subsidiary under Pac Rim Cayman, and gave it a physical U.S. address instead of a mere P.O. Box address in the Cayman Islands, these corporate changes were instrumental to try to conceal Claimant's real identity as a shell company. If Pac Rim Cayman had tried to bring its claims as a Cayman Islands investor, its true nature would have been more noticeable and it would have been more vulnerable to an attempt by El Salvador to pierce its corporate veil to get to the Canadian parent, Pacific Rim Mining Corp. The abuse of process thus facilitated the Investment Law proceeding, and that proceeding is equally tainted by the bad faith actions taken both before and during this arbitration.

B. A finding of lack of jurisdiction under CAFTA requires dismissal of the Investment Law proceeding because the two proceedings are indivisible

117. One of the three reasons stated by the Tribunal for not granting El Salvador's waiver objection during the Preliminary Objections phase of the arbitration was that the proceeding under CAFTA and the proceeding under the Investment Law were indivisible.[122] Being indivisible, the fate of one must befall the other. Therefore, a finding by the Tribunal that there is no jurisdiction under CAFTA, under either the abuse of process, the denial of benefits, or the *ratione temporis* objections, must necessarily result in the dismissal of the indivisible Investment Law proceeding. Fairness and judicial consistency dictate that a tribunal should decide the same question in the same manner at all stages of the same proceeding. To do otherwise would be arbitrary and counter to the very essence of judicial settlement of disputes.

[121] NOA, paras. 2, 14.
[122] Decision of the Tribunal on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, Aug. 2, 2010, para. 253.

If the two proceedings were linked for purposes of deciding not to apply the CAFTA waiver, they must also be linked for purposes of determining whether this arbitration may continue.

C. The CAFTA waiver requires dismissal of the Investment Law proceeding

118. The Tribunal's Decision on El Salvador's Preliminary Objections is not *res judicata*. CAFTA establishes that "[t]he respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5."[123] El Salvador's objection to the competence of the Tribunal and the jurisdiction of the Centre based on the CAFTA waiver during the Preliminary Objection phase was made under the expedited procedure of CAFTA Article 10.20.5, and therefore it was not waived. Thus, El Salvador has properly raised it again in the jurisdictional objections under ICSID Arbitration Rule 41.

119. Indeed, the circumstances of this case demonstrate why it was wise for the CAFTA drafters to provide that a jurisdictional objection filed under the expedited procedure is not waived if it is not accepted by the tribunal in the preliminary phase. In this jurisdictional objections stage, the reasoning for the waiver precluding Claimant from invoking a purported second instrument of jurisdiction to start a proceeding about the same measures involved in the CAFTA proceeding has become even clearer.

120. Because the Decision on El Salvador's Preliminary Objections is not *res judicata*, the Tribunal may decide to revisit its finding on the indivisibility of the two proceedings initiated by Claimant. But if the Tribunal revisits this finding and reverses it, then the Tribunal must also reconsider its preliminary finding on the effect of the CAFTA waiver to preclude the survival of an Investment Law proceeding that will necessarily be independent of any CAFTA proceeding.

121. If the Tribunal does not review its entire finding with regard to the waiver, the Tribunal would have made a final decision on a jurisdictional objection, which would then be part of its Award, without stating reasons. This is because the other reasons, in addition to the

[123] CAFTA Article 10.20.4(d).

indivisibility of the two proceedings, stated in the Decision on El Salvador's Preliminary Objections manifestly ignored and failed to discuss El Salvador's arguments that (a) the CAFTA proceeding and the Investment Law proceeding are proceedings (instead of two "procedures"),[124] and (b) even though El Salvador recognized and cited examples of double invocation of jurisdiction in previous ICSID arbitrations, those cases are significantly different because there was no waiver provision in the relevant treaty, whereas CAFTA includes a waiver requirement as a condition to consent.[125]

122. But the most important reason to revisit the decision on the waiver is that the jurisdictional phase has indeed shown that there are two proceedings based on the same measures and that Claimant is intending to detach those two proceedings and go forward with one proceeding independent from the other and under a different legal standard. This result is prohibited by the CAFTA waiver.

123. Claimant admitted at the hearing that the two proceedings are based on the same measures. Mr. Posner stated: "let me just emphasize in response to the Tribunal's question as to whether the measure at issue is the same for the CAFTA claims and the Investment Law claims, it is. In both cases the measure at issue is the de facto mining ban."[126] Mr. Ali also conceded that this is "one ICSID arbitration based on two separate consents in which different claims are being asserted under two different instruments of international investment protection, and which must be decided under what the Tribunal may ultimately determine to be different legal standards, even if those claims arise out of the same nucleus of facts."[127]

124. This is precisely the situation the CAFTA waiver precludes: a claimant making claims in two proceedings, one under CAFTA and one outside of CAFTA, arising out of the same measures. CAFTA does not require that the two proceedings be before different tribunals for the waiver to apply. The CAFTA waiver prohibits duplicative proceedings, regardless of

[124] El Salvador's Preliminary Objections, paras. 106-107; Reply (Preliminary Objections), para. 220.
[125] Reply (Preliminary Objections), para. 222.
[126] Transcript of Hearing, Day 3, at 724:9-14.
[127] Transcript of Hearing, Day 3, at 746:20 – 747:5.

whether they are raised before the same tribunal or before different tribunals. In this case, what CAFTA Article 10.18.2 prohibits is the conduct of initiating or continuing another international arbitration proceeding based on the same measures as the CAFTA proceeding, regardless of the mode of initiating the other proceeding.

125. We are now at the point in the arbitration where the logic of the CAFTA waiver becomes clear. Under Claimant's view, even if the CAFTA proceeding is dismissed for lack of jurisdiction, Claimant would be allowed to continue with an Investment Law proceeding related to the same measures alleged to be a breach of CAFTA. El Salvador would be faced with defending itself in a proceeding independent from any proceeding under CAFTA after a CAFTA proceeding based on the exact same measures has been litigated to its termination. This is precisely what CAFTA Article 10.18.2 prohibits. Being a condition on consent, and a condition that El Salvador has not waived, it deserves the Tribunal's full attention and consideration.

D. Pac Rim Cayman is not a foreign investor under the Investment Law

126. Even though Pac Rim Cayman appears registered as the foreign investor in the ONI registrations because the Salvadoran company seeking registration of the investment merely asked that Pac Rim Cayman be registered as the foreign investor, the reality is that Pac Rim Cayman did not make any investments in El Salvador. All the funds were sent by the Canadian parent. Thus Claimant is not a foreign investor under the Investment Law. El Salvador reaffirms and incorporates by reference its arguments in its written pleadings.[128]

E. The Tribunal should pierce Pac Rim Cayman's corporate veil and deny jurisdiction under the Investment Law

127. Because Claimant did not address this separate ground for declining jurisdiction under the Investment Law at the hearing, El Salvador reaffirms and incorporates by reference its arguments in its written pleadings.[129]

[128] Memorial, paras. 379-380; Reply, paras. 255-257.
[129] Memorial, paras. 381-423; Reply, paras. 258-261.

F. There is no consent to ICSID jurisdiction in Article 15 of the Investment Law

128. El Salvador noted at the hearing that CAFTA, BITs, and the ICSID Model Clause all include a separate reference to consent. For example, in CAFTA, in addition to Article 10.16 that states that a claimant may submit a claim to arbitration, there is a separate article that has a specific reference to consent by the State Party to arbitration. CAFTA Article 10.17, titled "Consent of Each Party to Arbitration" contains a specific acceptance by each CAFTA Party that it consents to the submission of a claim to arbitration if it is done in accordance with the CAFTA provisions. Then, Article 10.17.2 goes on to say that the consent mentioned in Article 10.17.1 satisfies the requirements of Chapter II of the ICSID Convention, among others. In contrast to this clear language indicating consent, Article 15 of the Investment Law does not include the word "consent" or a comparable acceptance of consent by El Salvador.

129. Because Article 15 of the Investment Law is a unilateral declaration, as opposed to reciprocal or multilateral statements of consent in a BIT or in CAFTA, and there is no clear statement of consent, it must be interpreted restrictively. For all the reasons stated in El Salvador's written pleadings, which are incorporated here by reference,[130] the proper interpretation is that Article 15 of the Investment Law does not constitute consent to arbitration for purposes of Article 25 of the ICSID Convention.

VI. COSTS

130. El Salvador requests that the Tribunal order Claimant to bear all the costs and expenses incurred by El Salvador in this arbitration, including attorney's fees, costs (including the Centre's costs), and post-Award interest.[131] El Salvador's costs should be reimbursed because Pac Rim Cayman initiated this arbitration about a mining exploitation concession it did not have

[130] Memorial, paras. 337-378; Reply, paras. 225-252.
[131] El Salvador requests using the six-month term LIBOR rate for U.S. dollar deposits published by the Wall Street Journal as of the date of the Award, plus four percent, beginning to accrue sixty days after the Award is dispatched to the parties, and compounded semi-annually until the Award is paid in full.

a right to receive, abusing the international arbitration process, and it also has made a series of false, misleading, and inconsistent statements before this Tribunal to try to keep its claims alive.

131. The hearing on jurisdiction affirmed that this arbitration is the result of an abuse of process. The Canadian mining company, Pacific Rim Mining Corp., had a dispute with El Salvador about its application for a mining exploitation concession in El Dorado and spent three years trying to resolve the dispute by lobbying the Government of El Salvador to change its Mining Law. But the communications from the Government to the company[132] and to the press[133] during those years of lobbying efforts made resolving the dispute appear increasingly unlikely. The Canadian company, therefore, hired international arbitration lawyers and changed the nationality of a subsidiary at the end of 2007 to gain jurisdiction over a pre-existing dispute.

132. Claimant, unable to contest the overwhelming evidence that the dispute existed before its change of nationality, has instead repeatedly tried to change its definition of the "measure at issue" and its explanation of when the dispute arose. This shifting of positions has been a common practice of Claimant throughout this arbitration.

133. Unlike Claimant, El Salvador has pursued its objections honestly and in good faith, seeking the quickest and most efficient resolution possible. El Salvador brought Preliminary Objections in an attempt to end this arbitration with the least expenditure of time and expense. Only after extensive written submissions and denials in the Preliminary Objections phase did Claimant accept that 1) it never had a "perfected right" to a concession and 2) it had known of problems with its application and chosen to try to lobby the Government to change its legal requirements instead of complying with them.[134]

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[132] NOI, para. 18 ("The Government's nascent opposition to the Enterprises' operations was first manifested by MARN in late 2005 . . . ."); NOI, para. 29 ("Since the end of 2006, when indications arose that MARN was intent on delaying the Enterprises' activities, it has become increasingly apparent that these delay tactics were designed and implemented . . . [to] prevent[] their operations altogether. . . . [C]ommencing in or about January 2007, MARN informed the Enterprises that it had taken the position - clearly unfounded in law . . . .").

[133] *La Prensa Gráfica*, *Enfoques*, "Adiós a Las Minas", July 9, 2006 (R-120); *El Diario de Hoy*, "Protesta contra explotación minera", June 24, 2007 (R-122).

[134] Claimant's Rejoinder on Respondent's Preliminary Objection, paras. 81, 49. Claimant abandoned the argument that it had a perfected right and instead argued that it should have been given the opportunity to

134. In this jurisdictional phase, Pacific Rim Mining Corp. has sought to disregard its own nationality and the relevant Treaty provisions, insisting on its right to arbitrate even though it does not qualify to initiate CAFTA claims or to invoke ICSID jurisdiction. Claimant again wasted time and expense before accepting the straightforward facts. As just one example, Claimant has continuously invoked the activities of the "Pacific Rim Companies" to suggest that Claimant had activities in the United States, even though it was forced to admit that Pac Rim Cayman is a passive holding company with no activities beyond holding shares on paper.

135. The facts are not complicated and these objections could have been argued concisely, but Claimant submitted a 256-page Counter-Memorial and a 186-page Rejoinder, sticking to the tactic: "if the facts are against you, focus on the law; if the law is against you, focus on the facts; if the law and the facts are against you, create distractions and confusion."

136. Claimant continued this tactic at the hearing, leaving less than 15 minutes of its three-hour opening to address both the abuse of process objection and the objections to the investment law claims. Claimant's counsel spent more than an hour laying out its version of the facts—the same facts it had presented in its written materials—before turning to the presentations that would put these facts "in the context of the specific objections raised by [El Salvador]."[135] Thus, rather than respond to El Salvador's points, Claimant devoted this lengthy amount of time to reiterating its narrative, including information related to everything from Ms. McLeod-Seltzer's background in mine financing to the earnings of the Dayton Mining (U.S.) subsidiary from the Denton Rawhide mine in Nevada. In other words, Claimant continued to obfuscate the key issues by presenting its narrative of irrelevant, mostly uncontested facts, interwoven with its conclusory allegations.

137. Claimant, however, cannot hide from the true facts: this dispute relates to the application for an environmental permit that was presumptively denied by December 2004, and

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"cure" the defects in its application. Claimant also admitted that it knew about the land surface problem in March 2005, "could have revised the application," and instead "chose" to proceed without making changes, "hoping that the Bureau of Mines would ultimately resolve" the issue in Claimant's favor.

[135] Transcript of Hearing, Day 1, at 210:8-10.

to the application for an exploitation concession that was terminated by operation of law in January 2007. By early 2007 at the latest, Pacific Rim knew that the concession application could not be approved until it either revised and resubmitted the application or succeeded in its efforts to change the Mining Law. Pacific Rim Mining Corp. changed the nationality of Pac Rim Cayman to the United States in December 2007. Within weeks of the change of nationality, Pacific Rim Mining Corp. was mentioning CAFTA protection related to the proposed El Dorado mine and Mr. Shrake threatened arbitration of the dispute in an April 2008 letter to the President.

138. Initiating this arbitration as a CAFTA claimant after changing nationality in December 2007 was an abuse of the international investment protection regime under CAFTA and ICSID. In addition, this Tribunal lacks jurisdiction for multiple alternative reasons, including El Salvador's right to deny benefits to the holding company subsidiary, lack of jurisdiction *ratione temporis*, and lack of jurisdiction under the Investment Law.

139. El Salvador, having been unfairly subjected to this abusive process and to Claimant's abusive tactics, should be entitled to recover the costs for its defense from Claimant.

140. El Salvador's costs in this arbitration are shown in the following table.

Republic of El Salvador's Statement of Costs	
Attorney's fees	$3,610,651.75
Other expenses	$447,068.21
Amounts paid or due to the Centre	$250,000.00
TOTAL:	$4,307,719.96

Dated: June 10, 2011

Respectfully submitted,

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ATTORNEYS FOR THE REPUBLIC OF EL SALVADOR